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No. 83-935

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

vs.

JOHN CLYDE ABEL, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION

TO PETITION FOR A WRIT

OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, JOHN CLYDE ABEL, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit's opinion in this case. That opinion is reported at United States v. Abel, 707 F.2d 1013 (9th Cir. 1983).

I.
QUESTION PRESENTED

WHETHER A WITNESS MAY PROPERLY BE IMPEACHED BY SHOWING THAT HE AND THE PARTY FOR WHOM HE TESTIFIES BELONGED TO A GROUP WHOSE MEMBERS ARE SWORN TO COMMIT PERJURY ON EACH OTHER'S BEHALF.

II.
STATEMENT OF THE CASE

Respondent, JOHN CLYDE ABEL, was convicted on a one count indictment of armed bank robbery in violation of Title 18 U.S.C. § 2113(a)(d). Following a jury trial in the United States District Court for the Central District of California, respondent received a twenty-five (25) year sentence. The Court of Appeals reversed his conviction.

The factual background of the case as presented by the government is not disputed.

* * *

III.
REASONS FOR DENYING THE WRIT

In its petition, the government argues four reasons for the granting of the petition. Since none of these reasons are persuasive, the writ should be denied.

1. The government's first point appears to be that the Ninth Circuit's evidentiary decision does not find support in the law. From the generally accepted principle that a witness' bias in favor of a party is always relevant evidence, the governen makes a broad leap and concludes that "any evidence from which partiality may be inferred--including common membership in a group--is important in assessing a witness' credibility." (Petitioner's brief at p.9) The government cites no authority for this broad proposition. Its reference to several commentators of evidence to support this proposition is misplaced. These commentators observe only that a witness' bias may be explored by examining the witness' relationship to the party. The Ninth Circuit's opinion does not disturb this evidentiary principle. That Court held only that evidence of group membership of a witness is not probative of the witness' credibility or veracity. This evidence is even more objectionable, that Court reasoned, when it raises the spectre of perjury without proof that the witness is committed to a group tenet which encourages perjury. The Ninth Circuit's conclusion that this evidence prejudiced the respondent should not be reviewed by this Court.

The government's petition to review the judgment of the Court of Appeals ignores a long standing principle that this Court will not grant a writ of certiorari to review an

evidentiary decision or to discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925) The only exception appears to apply in cases which are of significant importance for other reasons. Thus, this Court has specifically granted certiorari to review evidentiary decisions in cases dealing with important constitutional rights of criminal defendants. See e.g., Chambers v. Florida, 309 U.S. 227 (1940)(use of involuntary confessions); Williams v. Kaiser, 323 U.S. 471 (1945) (requirement of counsel in criminal cases).

The case at bar does not involve constitutional issues nor is it expected to have a wide range impact on evidentiary law. The decision of the Ninth Circuit is narrowly written and is limited to the factual posture of this case.

2. The government's second argument appears to be that the Ninth Circuit either misapplied the law or confused current law. The confusion, however, rests with the government's assertion that the Court of Appeals' reasoning would not allow evidence bearing upon credibility unless it was sufficient to prove a criminal offense (Petitioner's brief at p.9.) Simply stated, this is not the holding of the Court's opinion. Accordingly, the government's exaggerated claims that the law of evidence has been revolutionized are unfounded.

Further, the government has again argued, without citing any authority, that group membership may be proved where relevant to show bias. Respondent agrees that the government had a right to show that Mills might have been biased in favor of ABEL and he was cross-examined extensively in this regard. The prosecutor elicited from

the witness that he and respondent were friends and that they had served time together at the Lompoc Federal Prison. Clearly, the government could have argued to the jury that this long-standing friendship motivated the witness to lie on ABEL's behalf. However, the government was not content with this valuable impeachment evidence. Rather, it sought the extremely prejudicial evidence which properly resulted in reversal.

The government argues that the Ninth Circuit Court of Appeals reasoning would result in tremendous evidentiary problems. The government states that under the Ninth Circuit ruling, a jury would not be permitted to learn "that the sincere and convincing witness who testified for the defense was in fact the respondent's mother." These arguments are exaggerated and plainly disingenuous. The Solicitor General discusses several evidentiary problems which might arise under the ruling. It states that in a trial for murder resulting from a rifle shot fired at long range, the defendant's membership in a rifle club would not be admissible. In a trial for counterfeiting, the membership of the defendant in a printer's union would not be admissible. Respondent agrees that such evidence would not be admissible if it was not probative beyond the mere fact of membership. Such evidence is certainly admissible to show a person's ability or opportunity to commit the crime. However, it would not be admissible to prove character. It is a fundamental principle of evidence that a person cannot be convicted on the basis of his character.

A more proper example of the Court's ruling would be exemplified in a case where a Klu Klux Klansman is charged with the homicide of black man. Would the defendant's membership in the Klu Klux Klan be admissible evidence?

Clearly such evidence should be barred because of the great danger that a jury would convict the defendant due to his association with the Klu Klux Klan. However, this evidence would be admissible under the Ninth Circuit Court's ruling, if the defendant had espoused the beliefs of the Klu Klux Klan, and such beliefs were probative of the defendant's commission of the crime.

3. The government does not set out any substantive argument at paragraph 3 at page 12. Rather, the government contends that the district court judge carefully balanced the relevant factors and decided to allow the evidence. The Ninth Circuit's judgment is that the district court did not strike the proper balance and that the respondent was prejudiced as a result. This judgment should not be reviewed.

4. At paragraph 4 on page 13, the government urges the Supreme Court to accept this case to resolve conflicts in lower courts. Specifically, the Solicitor General makes reference to two cases, United States v. Bufalino, 683 F.2d 639, 646-47 (2nd Cir. 1982) and United States v. Mills, 704 F.2d 1553 (11th Cir. 1983), Pet. for Cert. pending no. 83-5286.

The government's contention that the decision by the Ninth Circuit Court of Appeals is in conflict with these two decisions in the second and eleventh circuits is without merit. In United States v. Abel, 707 F.2d 1013 (9th Cir. 1983), the Court was confronted with a problem distinctly different from that presented in Bufalino and Mills. Thus, what is allegedly a conflicting decision is easily distinguishable on its facts. In Abel, the Respondent was being prosecuted for an alleged bank robbery. Kurt Ehle,

one of the co-defendants, agreed to testify for the government against Abel. During the trial, Mills testified that Ehle had confided that he intended to testify falsely against Abel. Over defense counsel's objections, Mills was cross-examined regarding his membership in a secret prison organization which required its members to lie to protect the other members of the organization.

In Bufalino defendant was charged with attempting to arrange the murder of a witness against him. The government's theory was that defendant had prevailed upon James Fratianno to have the witness killed. On direct examination, the defendant said that his acquaintance with Fratianno was based on "chance meetings." Consequently, the Second Circuit found that it was proper for the government to cross-examine the defendant about his friendship with members of La Cosa Nostra and about his presence at Apalachin on November 14, 1957. (Apalachin was a reputed gangland convention). In holding that the cross-examination was proper given the facts, the Second Circuit recognized that "the line of interrogation poses the danger of allowing the jury to find Bufalino guilty by virtue of his association with known gangsters . . . ." 683 F.2d at 647. Nevertheless, the circuit court found the cross-examination proper because without the evidence it was unlikely that the jury would believe that Fratianno would agree to commit the crime. Id. at 647. Thus, in Bufalino, the purpose of introducing membership or references to La Cosa Nostra was not to show that the defendant was a mobster. Rather, the issue of such membership became an intergal part of the government's proof and necessary to link the defendant with the "hit-man"--James Fratianno.

In the Abel case, the prosecutor's motive in introducing evidence about membership in the "secret prison organization" was to show that the witness must be lying. This evidence was in no way related to the government's proof of the charged crime--bank robbery.

Mills involved a contract murder conspiracy which was an aspect of the broader Aryan Brotherhood conspiracy to control drug traffic. Mills complained of the admission of testimony on the organization, history and activities of the Aryan Brotherhood. The Eleventh Circuit found that the testimony was intrinsic to the crime charged. "To make the crime comprehensible to a jury it was necessary for the government to show how the Aryan Brotherhood functioned, that Mills was a member of the Aryan Brotherhood, that an affront to a fellow member might serve as an adequate motivation for Mills to kill a person whom he barely knew, and that it was possible for a member of the Brotherhood incarcerated in one federal prison to communicate the murder contract to another member in a different prison, despite mail censorship and restrictions on inter-inmate correspondence." 704 F.2d at 1559. Again evidence of membership in the Aryan Brotherhood became an integral and natural part of the government's account of the crime.

In Abel there were no allegations by the government that the Aryan Brotherhood had ordered the bank robbery or that it was in any way involved in the crime. Thus, any references to the "secret prison organization" were improper.

It is of note that the government concedes that Mills did not involve evidence of group membership to show bias. (Petition at page 14) This concession supports a conclusion that there is no conflict among the circuits.

5. The last argument in support of its petition for certiorari is that the decision of the Ninth Circuit may significantly hamper the government's efforts to combat organized criminal activity especially involving prison gangs. This argument appears to be highly inappropriate. In the guise of protection of the public, the government suggests that a person's constitutional rights should be trampled. The holding of the Abel case is sufficiently limited so that it will not have the revolutionary impact envisioned by the government. However even if it did have the impact of, "hampering the government's efforts to combat organized criminal activity", this should not be a consideration by this Court. A criminal defendant has a constitutional right to a fundamentally fair trial. After Chambers v. Florida, 309 U.S. 227, the government could not introduce into evidence a confession that had been obtained by improper means such as prolonged questioning. The government argued in Chambers that "law enforcement methods such as those under review are necessary to uphold our laws." Id. at 240. This Supreme Court found such an argument unpersuasive. This Court stated, "The Constitution proscribes such lawless means irrespective of the end." Id. at 241. A criminal defendant's rights cannot depend on the ease or difficulty of enforcing laws.

Aside from arguing an inappropriate consideration, it is clear that the government is reading too much into the judgment and limited holding of the Abel decision. The Court of Appeals did not hold that "the associational rights of group members " will preclude evidence of group membership. Nor did it hold that in prosecutions of prison gang members for organized crime activities, "the government will be barred from proving group membership or showing that group members are sworn to commit perjury on each other's behalf." (Petitioner's brief at p.15).

The Ninth Circuit's holding is sufficiently succint as to merit repeating here:

> We believe it to be a fundamental tenet of our criminal justice system that guilt or innocence, credibility or lack thereof, are personal, and cannot be established by evidence that a person merely belongs to a particular group, whether that group is ethnic, political, religious or social in character, and whether such membership is inherent or a matter of choice. It is settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity. [Cites]
>
> Rather, the government must show that the individual knows of and personally accepts the tenets of the organization. Neither should the government be allowed to impeach on grounds of mere membership, since membership, without more, has no probative value.

This holding requires only that the government be held to a high standard of proof in matters that go only to the credibility of a witness where prejudice to a criminal defendant may be substantial. The government must show not only membership, but that the witness who is a member espouses the tenets of the organization. Without this proof, such evidence alone has no probative value.

IV.

CONCLUSION

In summary, the Petition for a Writ of Certiorari should be denied because the Solicitor General has failed to present adequate grounds which would justify accepting this case for review. The Ninth Circuit relied on Supreme Court opinions to decide the Abel case. The Ninth Circuit relied on Scales v. United States, 367 U.S. 203, 219-24 (1959) and Brandenberg v. Ohio, 395 U.S. 444, 448 (1969). The Solicitor General did not cite any contrary authority. Neither did the Solicitor General cite any conflicting authority in the Ninth Circuit. Further, the authorities cited as conflicting in other circuits are distinguishable. Finally, the issue presented in Abel is not an important federal question, but one where the facts and evidentiary problems are restricted to the case itself. For these reasons, the Petition for a Writ of Certiorari should be denied.

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DATED: February 22, 1984

By _____
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vs.

JOHN CLYDE ABEL, RESPONDENT

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, JOHN CLYDE ABEL, by his undersigned counsel, asks leave to file the attached Response In Opposition To A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, without prepayment of costs and to proceed in forma pauperis. The Office of the Federal Public Defender by Deputy Federal Public Defender Yolanda Barrera Gomez, was appointed as counsel for Mr. ABEL in the trial court under the Criminal Justice Act, 18 U.S.C. § 3006(A)(d).

* * *

This motion is brought pursuant to Rule 46.1 of the Rules of the Supreme Court of the United States.

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DATED: February 24, 1984 By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 1984, a copy of the Motion for Leave to Proceed in Forma Pauperis and the Response In Opposition To A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to counsel for the petitioner, the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

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